

World Federation of Advertisers (WFA) position on international data transfers

Response to the draft European Data Protection Board Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data

The World Federation of Advertisers (WFA) is the voice of marketers worldwide, representing 90% of global marketing communications spend – over €800 billion per year – through a unique, global network of the world’s biggest markets and biggest marketers. WFA champions responsible and effective marketing communications worldwide.

We represent over 120 brand owners and 60 national advertiser associations worldwide. This includes national advertiser associations in 19 EU Member States and about 50% of the companies we represent are European.

We welcome the European Data Protection Board (EDPB)’s efforts to provide clarity and practical guidance for companies looking to ensure compliance with the EU level of protection of personal data for data they (or their partners) transfer to third countries. From a digital advertising perspective, personal data is often used to reduce consumer annoyance and disruption (e.g. by limiting the number of times an individual sees a particular ad) and to personalise advertising by showing only products or services that an individual is likely to be interested in. But the way that online advertising is bought and placed is complex and can involve many different intermediaries. In order to maintain a clear view of what data is being collected and how it is being used, advertisers are vocal in demanding accountability, transparency and compliance throughout their data supply chains – including in third countries.

However, the draft EDPB Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data (‘the Recommendations’) pose a number of challenges for advertisers seeking to maintain this approach to compliance. This paper outlines these challenges and the concerns they raise for advertisers, along with input on how the Recommendations could evolve to mitigate some of these issues.

(1) It is potentially unworkable for most companies to properly carry out the assessments required by the EDPB.

The assessments outlined in the Recommendations would entail significant and excessive efforts in terms of cost, complexity, time and competence. To properly carry out these assessments, a thorough analysis of international and local legislation, case law, authority decisions and other sources of information is required (including insight into the practical application of legislation, case law and decisions at local level). Most advertisers do not have the knowledge or competence to directly and thoroughly assess third-country legislation, jurisprudence and judicial/authority practice in this way. Acquiring these resources would most likely entail a disproportionate amount of time and cost. This could potentially lead to advertisers increasing their reliance on large, US-based tech companies who have the resources to carry out these assessments across their advertising products, which could have an impact on diversity and competition in the market.

(2) Shifting the burden of adequacy assessments to companies could lead to inconsistency and complexity

By shifting the burden of assessing the adequacy of third-country legal systems to the private sector, every company will be required to individually carry out numerous complex ad hoc assessments which will inevitably lead to inconsistent conclusions and differing approaches depending on multiple factors. This approach conflicts with the centralised approach outlined in Chapter V of the GDPR, which states that adequacy assessments can only be carried out by the EU Commission. Although the ‘substantial equivalence’ test may be different, both assessments share the goal of clearly assessing third-country legal systems’ protections for individuals, in line with the principle of legal certainty enshrined by the European Court of Justice as a general principle of EU law. In addition, in some jurisdictions this could require a detailed assessment and understanding of multiple local requirements in regions or states, for example in the US where the regulatory landscape is fragmented and companies would need to drill down to the level of 50 potential different legal requirements at state level.

